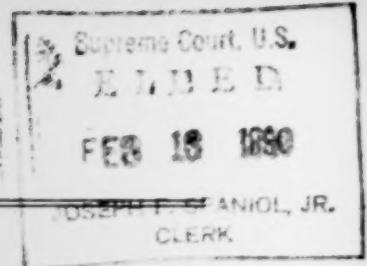


No. 89-1181



In The
Supreme Court of the United States
October Term, 1989

BURLINGTON NORTHERN RAILROAD COMPANY
EMPLOYEES,

Petitioner,

vs.

MONTANA DEPARTMENT OF REVENUE,

Respondent.

Petition For Writ Of Certiorari To The
Supreme Court Of The State Of Montana

BRIEF IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI

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*Counsel of Record

February, 1990

29 p



QUESTION PRESENTED

The Montana Supreme Court affirmed a judgment enforcing an administrative subpoena requiring a rail carrier to supply payroll information to the State of Montana for the purpose of ascertaining which of the carrier's employees are subject to income taxation.

The question presented in this case is the following: Does 49 USC § 11504 apply to the circumstance of a State seeking necessary information from an employer to be able to exercise its sovereign power to tax the income of persons deriving income from a trade or occupation conducted within its boundaries.

**PARTIES INVOLVED IN THE PROCEEDING AND
RULE 29.1 STATEMENT**

The undersigned, counsel of record for the Montana Department of Revenue, certifies that the following have an interest in the outcome of this case:

State of Montana

Department of Revenue

Burlington Northern, Inc., and Burlington Northern
Railroad Company

Burlington Northern Railroad Company Employees

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OPINION BELOW

The Montana Supreme Court issued an opinion in this case which is reported *Burlington Northern, Inc, et al. v. Montana Department of Revenue*, ___ Mont. ___, 781 P.2d 1121 (1989). A copy of the Montana court's opinion is included in the Petitioners' Appendix to the Petition For Writ Of Certiorari at A-11, 28.

JURISDICTION

The Montana Department of Revenue agrees with the Petitioners' statement of jurisdiction.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Montana Department of Revenue concurs in the Petitioners' statement of constitutional provisions and statutes involved.

STATEMENT OF THE CASE

The Petitioners in their statement of the case have made misstatements of fact. On August 25, 1988, the Montana Department of Revenue issued a subpoena to the Burlington Northern Railroad requesting a copy of Pay Report 830A. Pay Report 830A is an internal payroll document prepared by Burlington Northern. The Department needs this information to be able to:

(a) Identify individuals who have earned income within the State of Montana;

(b) To verify wages reported by BNRR employees on tax returns voluntarily filed; and,

(c) Estimate tax liabilities of BNRR employees who earned income in Montana but refuse to voluntarily file a tax return.

Affidavit of David Olsen, Respondent's Appendix B, at 8a.

The Petitioners state Pay Report 830A is "a tax information form covering all Burlington Northern employees who worked in Montana during 1986 and 1987." The record in this matter does not support the Petitioners statement. Attached to Burlington Northern Incorporated's Complaint (Petitioner's Appendix, A-2) is an affidavit from Eric A. Engebrecht, Burlington Northern's tax manager. He states that Pay Report 830C is a payroll record for Burlington Northern Railroad. Respondent's Appendix, C, at 11a. Attached to the Department of Revenue's answer and counter claim (Petitioner's Appendix) is an affidavit from David Olsen, Department's Compliance Section Supervisor. He describes the information which he believes is contained in Pay Report 830A. The Department is seeking payroll information maintained by the Burlington Northern Railroad in the regular course of its business. It is not seeking a "tax information form."

The Petitioners' employer Burlington Northern Railroad commenced an action in the Montana District Court seeking an injunction and an order quashing the subpoena. In response, the Department filed an answer and a cross-complaint seeking enforcement of the Department's subpoena. The Petitioners were allowed to intervene. The

Petitioners alleged in their Motion For Intervention and along with it in their Complaint In Intervention that, "None of them earned more than 50 percent of his income in Montana and none traveled more than 50 percent of his total annual track miles in Montana in either 1986 or 1987." *Petition For Writ of Certiorari*, page 2. The District Court granted the Petitioners motion. Petitioners' Appendix A-5, 16. However, they were allowed to intervene on only a limited basis. The District Court's order makes it quite clear the Petitioners were allowed to intervene only "on the question of the interpretation of 49 USC § 11054 (sic)." District Court Order, Petitioner's Appendix, A-5, 16. Therefore, the Petitioners' statement that they do not travel 50 percent of their working miles or spend 50 percent of their time working in Montana are not facts contained in this record.

The Montana District Court denied the Burlington Northern's and the Petitioners' motion to quash the subpoena. The Petitioners appealed the District Court's judgment to the Montana Supreme Court.

The Montana Supreme Court affirmed the lower court on the following factual grounds:

From the agreed facts in the pleadings, it is shown that Burlington Northern, Inc. is a corporation doing business in Montana through one or more of its wholly owned subsidiaries. Burlington Northern Railroad Company is a corporation doing a rail carrier business in interstate commerce. Burlington Northern employees, both trainmen and maintenance persons, work both within and outside Montana. These employees are residents of various states.

The Court concluded:

While § 11504 fixes the mandatory duties of employers engaged in interstate commerce to withhold taxes and to file reports respecting earnings in any particular state, the statute does not prohibit the furnishing of earnings information at the request of the state, or under a properly issued administrative subpoena. Since the furnishing of such information is necessary for the Department of Revenue properly to administer and apply the Montana state income tax on nonresidents employees, the requirement that Burlington Northern furnish such information pursuant to the administrative subpoena cannot be an unreasonable burden on interstate commerce.

Burlington Northern v. Department of Revenue, ___ Mont. ___, 781 P.2d 1121, 1125 (1989); Petitioner's Appendix A-11, 28.

STAGE IN PROCEEDINGS WHEN FEDERAL QUESTIONS WERE RAISED

The Montana Department of Revenue agrees with the Petitioners' statement of the stage in proceedings when federal questions were raised.

REASONS WHY THE WRIT SHOULD BE DENIED

This Court will only grant review on a writ of certiorari, "when there are special and important reasons therefor." *Rule 17.1*, U.S.C.S., Supreme Court Rules. This

case does not present to the Court any special or important issues which call for its review. The issue presented in this case, as stated by the Montana Supreme Court is:

[W]hether 49 U.S.C. § 11504 prohibits the state of Montana from requiring Burlington Northern under an administrative subpoena duces tecum to provide Pay Report 830A concerning the intervenor plaintiffs, who are residents of Washington, and who do not work more than 50 percent of time or track miles in Montana.

Burlington Northern, Inc. v. Montana Department of Revenue, ___ Mont. ___, 781 P.2d 1121, 1123 (1989); Petitioners' Appendix A-11, 28-29.

The Montana Supreme Court concluded that Montana's attempt to obtain payroll information was not in conflict with the Supremacy Clause. It also concluded the subpoena was not a burden on interstate commerce because Congress did not intend § 11504 to apply in this situation.

Congress set out to provide, and did provide, certain minimums under which the rail carriers were not obliged to withhold income taxes for states or other governmental entities, or obliged to file income tax information returns.

In setting those minimums, Congress did not intend to, and the language of the statute of § 11504 shows that it did not prohibit the states or other governmental entities from levying income taxes on earnings by employees of interstate carriers within the jurisdiction of the various governmental entities. Section 11504 directs itself only to the problem of withholding state income taxes and filing mandatory reports of the carrier.

Burlington Northern, *supra*, at 1124, Petitioner's Appendix, A-11, 31.

The Montana Court correctly decided the issue. This case presents a simple issue of statutory construction. While the statute in question is a federal statute the Montana Supreme Court's interpretation does not present a substantial federal question. *Norman v. Baltimore & Ohio Railroad*, 294 U.S. 240 (1935).

The Petitioners argue Montana is requiring their employer to file "tax information reports" which is prohibited by § 11504. That section provides in pertinent part that:

[d](2) A [rail, express, sleeping car,] motor, or motor private carrier withholding pay from an employee under subsection [(a) or] (b) of this section shall file income tax information returns and other reports only with -

[(1)](A) the State and subdivision of residence of the employee; and

[(2)](B) the State and subdivision in which withholding of pay is required under subsection [(a) or] (b) of this section.

The Petitioners argue the Montana Supreme Court's decision makes this section meaningless. They refuse to accept this factual situation has already been reviewed by two courts. Both courts determined § 11504 has no application in this case. The Respondent is not requiring their employer to file any "tax information reports." All the State is asking is that Montana be allowed to obtain the information necessary to determine which of Burlington Northern's employees are working in Montana. The State also needs to know how much income they earned while

working in Montana. The Petitioners are attempting to stretch the application of § 11504 to a situation which Congress never intended. By arguing that § 11504 prohibits the State from obtaining such information the Petitioners are in effect arguing the State has no power to tax their earnings. It was never the intent of Congress by its enactment of § 11504 to restrict the states power to tax nonresidents. The Montana Supreme Court ably expressed the error in Petitioners' argument stating:

There is a basic flaw in the Supremacy Clause argument posed by Burlington Northern employees in this case. It presupposes that the provisions of § 11504 and the state income tax laws, rules and regulations are in direct conflict. This is not the case. . . .

Burlington Northern Railroad v. Department of Revenue, ___ Mont. ___, 781 P.2d 1121, 1124 (1989); Petitioner's Appendix A-11, 30-31.

The Montana Court's decision correctly interpreted the legislative intent of Congress. The Court held:

Congress set out to provide, and did provide, certain minimums under which the rail carriers were not obliged to withhold income taxes for states or other governmental entities, or obliged to file income tax information returns.

In setting those minimums, Congress did not intend to, and the language of the statute of § 11504 shows that it did not prohibit the states or other governmental entities from levying income taxes on earnings by employees of interstate carriers within the jurisdiction of the various governmental entities. Section 11504 directs itself only to the problem of withholding state income taxes and filing mandatory reports of the carrier.

Burlington Northern, *supra* at 1124, Petitioner's Appendix A-11, 31.

The legislative history of 49 USCS § 11504, shows Congress never intended § 11504 to apply in the factual situation presented in this case. Senator Prouty speaking in favor of the Conference Committee report on the floor of the Senate stated:

Nonetheless, Mr. President, the bill which you have before you, and which was agreed to in conference, is a very great step toward solving the unique tax problems of the employees of interstate common carriers and, I might add, of the carriers themselves. *While it does not limit the liability of such employees, it does limit the number of States which may require withholding from the compensation paid to an interstate carrier employee to not more than one and the number of States which may require the filing of information returns with respect to the compensation of such employee to not more than two.* (emphasis supplied)

Congressional Record – Senate, at 40313 (December 3, 1970).

- The Montana Supreme Court based its decision upon the intent of Congress and § 11504's legislative history as this Court would do if presented with the issue. *Dickerson v. New Banner Institute, Inc.*, 460 U.S. 103, 110 (1983); *Philbrook v. Glodgett*, 421 U.S. 707, 713 (1975).

The Petitioners further argue that Montana's subpoena is a burden on interstate commerce. Again the Petitioners fail to recognize § 11504 has no application in this situation. This Court and other state courts have held that it is not a burden on interstate commerce for a state to tax the income of nonresidents. See: *Shaffer v. Carter*,

252 U.S. 37 (1920); *Alaska Steamship Co. v. Mullaney*, 180 F.2d 805, 12 Alaska 594 (1950); *Alaska v. Petronia, et al.*, 69 Wash. 2d 460, 418 P.2d 755 (1966) cf. *Blangers v. Department of Revenue and Taxation*, ___ Idaho ___, 763 P.2d 1052 (1988) cert. den. ___ U.S. ___ (1989).

It would be a useless power for the states to be able to tax the income of a nonresident if the state cannot obtain the names of the nonresident working in their state and the amount of their income from their employers. If it's not a burden to tax the income surely it cannot be a burden to require an employer to provide the information to carry out the power to tax. In *Shaffer v. Carter*, *supra*, this Court held:

It is urged that regarding the tax as imposed upon the business conducted within the State, it amounts in the case of appellant's business to a burden upon interstate commerce, because the products of his oil operations are shipped out of State. Assuming that it fairly appears that his method of business constitutes interstate commerce, it is sufficient to say the tax is not imposed upon the gross receipts, as in *Crew Levick Co. v. Pennsylvania*, 254 U.S. 292, but only upon the net proceeds, and is plainly sustainable even if it includes net gains from interstate commerce. *U.S. Glue Co. v. Oak Creek*, 247 U.S. 321.

Ibid., at 57.

CONCLUSION

Based upon the plain meaning of 49 USCS § 11504 the use by the Respondent's of an administrative subpoena to

obtain payroll information from the Petitioners' employer is not a violation of the Supremacy Clause. There can be no conflict with the supreme law by a state if Congress did not intend to legislate a restriction upon state action. Congress did not intend 49 USCS § 11504 to be a limitation upon the State's powers to tax railroad employees. If the exercise of the power to tax nonresidents is not a burden on commerce then neither is the exercise of the power to obtain information to carry out that power a burden. *Shaffer v. Carter*, *supra*.

DATED this 16th day of February, 1990.

Respectfully submitted,

R. BRUCE MCGINNIS

Counsel of Record

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APPENDIX A

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ATTORNEYS FOR INTERVENORS

MONTANA FIRST JUDICIAL DISTRICT COURT,
LEWIS & CLARK COUNTY

BURLINGTON NORTHERN,
INC., and BURLINGTON
NORTHERN RAILROAD
COMPANY,

Plaintiffs,

vs.

MONTANA DEPARTMENT
Of REVENUE,

Defendant.

JAMES R. ALLAN, JERRY A.

BAKER, PATRICK R.

BARTLESON, THOMAS E.

BENDER, ROBERT F.

BLANGERES, RONALD V.

BLANK, CHARLES F.

BRENNAN, DONALD D.

BUTTS, RANDY CARTWRIGHT,

CLIFFORD DAVIS, R.J.

EDGAR, MICHAEL FISK,

J.E. FLANNERY, W.P.

Cause No.

CDV-88-797

COMPLAINT OF
INTERVENORS
FOR
INJUNCTION
AND DAMAGES

FOSTER, MARVIN L. FRANZ,)
 GARY L. FRIBERG, STEVEN E.)
 GARLAND, FREDERICK E. GEST,)
 ROBERT J. GRIFFIN, WILLIAM B.)
 GRIMES, ROBERT L.)
 GROOMS PATRICK L.)
 HARRINGTON, DONALD J.)
 HEINEN, VIC A. HERRINGTON,)
 JOHN HLUBOKY, ROBERT D.)
 HOUX, DONALD C. HOWARD,)
 ROBERT K. HUGUENIN, DUANE)
 JUMP, GEORGE L. KENDALL,)
 ROBERT W. KING, JOHN A.)
 KLOMP, L. P. KNUTSON,)
 JERRY D. KOHLIEBER,)
 RICHARD P. KOHN, KENNETH)
 M. LEYDE, LARRY G. MACARTY,)
 HARRY MAIER, THOMAS A.)
 MARABELIO, E. G. MATHENA,)
 DONALD W. MAY, PATRICK J.)
 McCARTHY, JOHN H. PEBLES,)
 JACK A. PETERSON, JOE D.)
 PILIK, L. W. PINKLEY, W.G.)
 QUINTON, DONALD M. REID,)
 JOHN E. ROSSI, JAMES C.)
 SCOTT, WARREN H. SHOOP,)
 GARY R. SMITH, DONALD H.)
 STIER, MICHAEL J. STOWELL,)
 ROBERT J. STRAHL, THOMAS L.)
 TAYLOR, JAMES H. THOMSON,)
 DAVID J. WARDIAN, TIMOTHY J.)
 WATSON, JAMES H. WEAVER,)
 JEFFREY D. WEST, LOUIS F.)
 WILLIAMS, MICHAEL A.)
 WILLIAMS,)
 STEVEN M. WILSON, KEN)
 WOLKENHAUER,)
 Intervenor.)

Intervenors allege as follows:

1. Each of the above named intervenors is a resident of the State of Washington. Each of them is employed by plaintiff Burlington Northern Railroad Company, as a member of a train crew, and performs regularly assigned duties on a locomotive, car or other track-borne vehicle within three states between intervenors' home terminal at Spokane, Washington and a terminal at Whitefish, Montana.
2. The mileage traveled by each intervenor for Burlington Northern during each of the calendar years 1986 and 1987 was not more than 50% of the total mileage traveled by each intervenor while so employed during said calendar years.
3. Notwithstanding the foregoing facts, plaintiff Burlington Northern Railroad Company is unlawfully withholding income taxes for the benefit of the State of Montana from the wages of intervenors J.E. Flannery, Robert L. Grooms, John Hluboky, Donald C. Howard, Robert K. Huguenin, E.G. Mathena, Patrick J. McCarthy, Gary R. Smith, and Ken Wolkenhauer, in violation of 49 U.S. Code, section 11504.
4. Notwithstanding the foregoing facts, defendant Montana Department of Revenue is unlawfully asserting tax claims against intervenors R.J. Edgar, Michael Fisk, Marvin L. Franz, Donald J. Heinen, Duane Jump, John A. Klomp, Larry G. Macarty, Donald W. May, John H. Pebles, Jack A. Peterson, W.G. Quinton, Donald M. Reid, John E. Rossi, Gary R. Smith, Robert J. Strahl, and Michael A. Williams, in violation of the provisions of 49 U.S. Code, Section 11504.

5. Defendant Montana Department of Revenue has issued payroll garnishments against Burlington Northern, unlawfully, without due process, and without notice or opportunity for hearing, seizing payroll due to intervenors Michael Fisk, Robert W. King, Jack A. Peterson, John E. Rossi, and Gary R. Smith.

6. Intervenors are informed and believe that on August 25, 1988 defendant Montana Department of Revenue issued an administrative subpoena to Burlington Northern Railroad Company seeking payroll information which would include information regarding intervenors. The seeking and/or furnishing of said payroll information violates 49 U.S. Code, Sec. 11504. The furnishing of said information would violate the federal statutory rights of the remaining intervenors as well as those who have already been damaged by unlawful withholding, assertion of claims and garnishments as listed above.

7. The United States District Court for the Eastern District of Washington has ruled in an action in which all or most of the intervenors, Burlington Northern, and the Montana Department of Revenue were parties, that intervenors have an adequate remedy to enforce the provisions of 49 U.S. Code, Section 11504 in the state courts of Montana.

8. Intervenors will suffer irreparable harm if the administrative subpoena is enforced, and if the tax claims of the Montana Department of Revenue continue to be asserted and unlawfully collected as above alleged. Intervenors have no adequate remedy at law to prohibit further violations of their rights, and injunctions are necessary to enforce the same.

9. The named intervenors have sustained monetary damages from unlawful withholding of taxes from their wages, unlawful assertions of tax claims and wage garnishments, in sums to be proved at trial.

WHEREFORE Intervenor's pray judgment as follows:

1. A permanent injunction enjoining plaintiffs Burlington Northern, Inc. and Burlington Northern Railroad Company from furnishing to defendant Montana Department of Revenue any payroll information regarding earnings of the intervenors for 1986 and 1987, and for any future years in which intervenors travel no more than 50% of their mileage within the State of Washington.

2. A permanent injunction enjoining the Montana Department of Revenue from subpoenaing payroll information of any of the intervenors for the calendar year 1986 and 1987 and any future years in which they travel no more than 50% of their mileage within the State of Montana.

3. Judgment against plaintiffs Burlington Northern, Inc. and Burlington Northern Railroad Company for damages sustained by the intervenors whose wages have been unlawfully withheld in violation of 49 U.S. Code, Section 11504.

4. Judgment against Montana Department of Revenue for damages sustained by the intervenors whose wages were garnished without notice of an opportunity to be heard in violation of due process of law.

5. Award of reasonable attorney's fee and costs.

6. Such other and further relief as may be proper.

DATED: October 18, 1988.

POWELL & MORRIS, P.S.

/s/

William J. Powell

/s/

Larry Elison

1101 Greenough Dr., Suite B-8
Missoula, MT 59802

ATTORNEYS FOR
INTERVENORS

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the ____
day of ___, 1988 a true and correct copy of the
foregoing was served on counsel of record in
person at the following address:

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/s/

APPENDIX B

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MONTANA FIRST JUDICIAL DISTRICT COURT,
LEWIS & CLARK COUNTY

BURLINGTON NORTHERN,)	
INC. and BURLINGTON)	
NORTHERN RAILROAD)	
COMPANY,)	
Plaintiff,)	Cause No.
)	BDV-88-797
- vs -)	
MONTANA DEPARTMENT)	
OF REVENUE,)	
Defendant.)	

* * *

AFFIDAVIT OF DAVE OLSEN

DAVE OLSEN, being first duly sworn deposes and says that:

1. He is of lawful age and a resident of Lewis and Clark County Montana.
2. He is employed by the State of Montana, Department of Revenue as the Supervisor of the Compliance Section of the Income Tax Division.

3. As a part of his duties in that position he is to enforce the tax laws of Montana as they apply to nonresidents who have a source of income in Montana.

4. To perform those duties with respect to nonresident employees of the Burlington Northern Railroad Company it is necessary for him to have the names of Employees, the employees BNRR number, address, social security number, state of residence, an itemized listing of all the states in which the employee worked during a year, the wages earned by the employee in each state, and the amount withheld by BNRR in each state.

5. The information referred to in paragraph 4 can be found in BNRR documents specifically Pay Report 830A.

6. The Department has directed a administrative subpoena to BNRR to obtain this information.

7. The information requested in the subpoena is needed by the Compliance Section to:

(a) Identify individuals who have earned income within the State of Montana;

(b) To verify wages reported by BNRR employees on tax returns voluntarily filed; and,

(c) Estimate tax liabilities of BNRR employees who earned income in Montana but refuse to voluntarily file a tax return.

8. The last Pay Report 830A which the Department received dealt with wages earned in 1981.

9. The Department has repeatedly asked for reports covering subsequent years.

10. The information contained on BNRR Pay Report 830A (total wages earned in all states), as opposed to the information contained on BNRR Pay Report 830C (total wages earned in Montana), is of more use to the Department when computing an individual employees tax liability. With the additional information on Pay Report 830A (total federal wages), the Department can allow the taxpayer credit for a prorated personal exemption. Without the total income figure, a non-resident taxpayer can not be given credit for a personal exemption when an estimate is made.

11. If the BNRR is not required to provide the subpoenaed information, the Department would have limited means available to identify the nonresidents subject to tax. The Department could not ensure that BNRR employees filed the required tax returns. In the event they did not file, the Department could not verify that the correct taxable income was reported. In both cases, the net result would be a loss of revenue to the state.

12. The only alternative method of obtaining the wage information requested in the subpoena would be to audit BNRR annually to ensure they are in compliance with 40 USCS § 11504. BNRR would be required to show that they are reporting all individuals to Montana that earn more than 50% of their income in this state. To do so, the records of the individuals earning less than 50% of their income in Montana would have to be made available.

Further affiant sayeth not.

DATED this ____ day of October, 1988.

/s/ _____

State of Montana

) ss.

County of Lewis and Clark

)

On this ____ day of ___, 1988, before me a Notary Public for the State of Montana, personally appeared DAVE OLSEN, known to me to be the person whose name is subscribed to the within instrument and acknowledged to me that he executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year in this certificate above written.

/s/ _____

Notary Public for the
State of Montana

Residing at _____

My Commission Expires: _____

SEAL

APPENDIX C

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 Attorneys for Plaintiffs

IN THE FIRST JUDICIAL DISTRICT, STATE OF
 MONTANA

BURLINGTON NORTHERN,)	
INC., and BURLINGTON)	
NORTHERN RAILROAD)	Cause No.
COMPANY,)	BDV 88-797
)	
Plaintiffs,)	AFFIDAVIT OF
v.)	ERIC A.
)	ENGBRECHT
MONTANA DEPARTMENT)	
OF REVENUE,)	
)	
Defendant.)	

* * *

STATE OF MINNESOTA)	
County of Ramsey)	ss.
)	

I, Eric A. Engbrecht, being first duly deposed and sworn, state:

1. I am the Manager, Taxes, Tax Accounting for Burlington Northern Railroad Company ("BNRR"), to whom the administrative subpoena in the above-captioned case was directed.

2. My department maintains various payroll records and information for BNRR, including Pay Report 830C.

3. Pay Report 830C contains, *inter alia*, the amount of income received by calendar year for each railroad employee for work done in Montana, whether or not the individual employee is a resident of Montana or worked more (or less) than 50 percent of his or her time in Montana. Other information contained in that report includes the name, address and social security number of each employee, the employee's identification number issued by BNRR, the state of residence, earnings attributable to work performed in Montana as stated above, and the Montana state income tax withheld, if any.

4. Pursuant to 49 U.S.C. 11504, BNRR withholds Montana state income tax from each employee who earns more than 50 percent of his or her income from work done in Montana. In addition, if an employee who is a Montana resident does not earn more than 50 percent of his or her income from any one state other than Montana, then BNRR withholds Montana state income tax from that employee as well. Thus, there are five possible scenarios to determine which BNRR employees are subject to Montana state income tax withholding pursuant to 49 U.S.C. 11504, which are depicted by the following table:

Employee's State of Residence	More than 50% Income Earned in Montana	More than 50% Income Earned in Another State	Montana Withholding
Montana	Yes	No	Yes
Montana	No	Yes	No
Montana	No	No	Yes
Not Montana	Yes	No	Yes
Not Montana	No	Yes	No

5. Utilizing this statutorily dictated method for determining when Montana state income tax should be withheld pursuant to 49 U.S.C. § 11504, in calendar year 1987, there were 632 BNRR employees from 15 states who earned a portion of their income from work done in Montana (as defined by 49 U.S.C. § 11504(a)) but for whom no Montana income tax was withheld (as provided by 49 U.S.C. § 11504(b)). Of those 632 employees, 60 were Montana residents. Thus, 572 employees from 14 states other than Montana had no Montana state income tax withheld because less than 50 percent of their income was derived from work performed in Montana, and 60 Montana residents had no Montana state income tax withheld because more than 50 percent of their income was derived from work performed in another state other than Montana. Likewise, in 1986, 709 employees from 14 states other than Montana had no Montana state income tax withheld for the same reason identified in the preceding sentence.

6. In 1987, there were 5597 employees of BNRR who earned at least some portion of their income from work performed in Montana.

7. It is the specific information about employees who are not Montana residents for whom BNRR does not withhold any amount from their income for Montana state income tax purposes pursuant to 49 U.S.C. § 11504 that the Montana Department of Revenue now seeks.

8. Further, Affiant sayeth not.

/s/ _____
Eric A. Engbrecht

Subscribed and Sworn to before me this ____ day of
____, 1988.

/s/ _____
Notary Public for the
State of Minnesota
Residing at Ramsey County -
My Commission expires ____

CERTIFICATE OF SERVICE

I hereby certify that on the ____ day of ____, 1988 a true
copy of the foregoing "Affidavit of Eric A. Engbrecht"
was personally served upon the following:

Mr. John D. LaFaver
Montana Department of Revenue
Room 455
Sam W. Mitchell Building
Capitol Station
Helena, MT 59620

Mr. Paul J. VanTricht
Tax Counsel
Office of Legal Affairs
Montana Department of Revenue
Room 485
Sam W. Mitchell Building
Capitol Station
Helena, MT 59620

/s/ _____
